

UNFAIR TRADE DEFENSES

Drawing by Alfred Everett Orr

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"The company's lawyers told their apoplectic clients that they would be throwing good money after a bad name to start proceedings."

SEBASTOPOL cigarettes (that isn't their real name, manufactured in New York, were well known in some parts of the country and enjoyed a good sale. A rival manufacturer put out a brand that he called "South Pole Cigarettes." The labels on the fronts of the boxes were strikingly similar, but there was no resemblance in the side and bottom labels. When the goods were on the shelves, however, only the top label was visible to intending purchasers. It was no defense for the offending manufacturer that the hidden parts of his labels did not resemble the plaintiff's labels.

TWENTY-FIVE years ago a Roman Catholic priest living in Bavaria caught the attention of the world by publishing a system of sanitary and dietetic rules. He established a sanatorium in Bavaria. He disapproved of the use of coffee, and for it substituted a preparation that had no coffee in it, transferring to a European corporation the right to manufacture and advertise it. The European corporation established an American agency, and authorized it to sell the product as made from the Bavarian priest's formula.

Some Chicago people attempted to obtain the right to manufacture and sell his "coffee" in this country; but this permission was refused. Nevertheless they organized a corporation and used his name, under which they sold a coffee preparation. The packages were marked with the picture of the priest and a facsimile of his signature. This was the same manner in which the authorized corporation marked its packages. The European corporation, through its American representatives, brought suit against the Chicago organization. The latter said that no injunction ought to be issued, because the product was practically unknown in this country, and had no established market, and inasmuch as the authorized corporation had no established market or reputation the Chicago concern could not be said to be stealing that reputation or market.

But the court said that the clergyman was known throughout the civilized world. He had forbidden the Chicago concern to use his picture and signature. It was not only the large successes and established businesses that were entitled to protection. If this was the case, every business would be liable to unfair competition until it had achieved an unusual success, and in such circumstances large expenses would be almost impossible. Any manufacturer or merchant who was putting an article upon the market with the desire and the hope of establishing a reputation and a sale for his product was entitled to the complete protection of the law. The general public was at all times entitled to be safe from deception on the part of unscrupulous dealers.

WHAT we will call the White Foam Washing Powder was first put on the market in 1887. In 1897 an Oregon concern began to advertise and sell a wash-

ing powder which we will call "White Flake Washing Powder." Court proceedings were instituted. The defendants called attention to the entire dissimilarity of their labels, and said that they had adopted the term White Flake because they expected their product to sell principally in the northwestern Pacific States, and in that region a brand of fruit known as White Flake was very popular. For this reason, and because the word White Flake was easy to remember and effective for advertising purposes, they decided that it would be a good name for their product. They said, moreover, that they had never intended any fraud or deceit, and had never authorized any retail grocers or merchants to pass their product off as White Foam.

The court decided that if the defendants wilfully and knowingly put it in the power of retailers to deceive their customers, they must be held responsible and would be subject to an injunction. The exact intention with which a name or label or device is adopted is not always material. The question is, What are the results? Is confusion likely to result? Is the purchasing public likely to be deceived by the name or the label? If deception is the result, then it makes no difference that it was not intended by the infringer. There was actually deception and confusion in this case, and both the original dealer and the public were entitled to protection against such results.

Nor was it any defense for the manufacturers of White Flake that the labels and packages were entirely different in appearance. A trademark or the dress of a package is intended to appeal to the eye. It is used so that purchasers, looking over the shelves, will notice the particular goods they want. On the other hand, a trade name is intended to appeal to the ear. It is used so that when a dealer mentions the goods he has in stock a purchaser will recognize the name of the goods he has previously used. If the trade name infringes, it is immaterial that the trademark or the dress of the package is entirely different.

BUT the mere fact that a manufacturer or trader has a trade name that he considers valuable does not necessarily entitle him to the protection of the courts. A man's own conduct may be such that he loses the right to the exclusive use of the term.

We have seen how a descriptive word may acquire a secondary meaning and be used to identify the product of a particular individual. Conversely, a word that was originally entirely individual in its meaning may come to have a generic or descriptive significance.

The French Republic brought suit in the United States courts against the Saratoga Vichy Springs Company. The Vichy Springs in France have been known for their medicinal properties since the time of the Roman Empire. Originally they belonged to the feudal lord of Vichy. In 1444 they were sold by the Lord of Vichy to the Duke of Bourbon, and in 1532 were confiscated by the King of France. In 1790 these springs

became the property of the French Republic, and were operated directly by the government until 1853, when they were leased to the Vichy company under a lease that runs until 1934. The waters have been exported to all parts of the world since 1716.

In 1872 a spring was opened at Saratoga Springs, New York, to which the owners gave the name of Vichy. This water has some slight resemblance to the French vichy in taste; but the ingredients and qualities are entirely different. The Saratoga waters were sold all over the United States under the name of Saratoga vichy. In addition, for many years artificial carbonated water was sold at drugstores and soda fountains throughout the country as vichy. In 1902 the French Republic began action to prevent the Saratoga Vichy Springs Company from using the name vichy. The court said that in popular understanding the term vichy had come to mean carbonated waters, and no longer identified the French vichy exclusively. In 1872 the French Republic or the company that operated the Vichy Springs might have had a property right in the name vichy; but when for more than thirty years they permitted the Saratoga Company and hundreds of manufacturers of carbonated waters throughout the country to sell water under the name vichy, the original exclusive rights in the word had been lost. Such acquiescence of the French Republic had made the term vichy a generic word as applied to carbonated waters, and therefore it was not entitled to an injunction against the Saratoga Company.

IF a patented article is known by the name of the inventor or patentee, after the patent expires anyone can manufacture the article and sell it under the name by which it is known to the public. The same is true of copyright works. After the copyright expires anyone may reproduce the work and sell it under the name of the author. These rules were laid down in litigation involving sewing machines and dictionaries.

Throughout the life of the patents the manufacturers of the machines always called their machines by a certain name. They advertised the name extensively, and identified their product by the name, which was machines made under certain patents.

When these patents expired another manufacturer made sewing machines upon the same models and called them by the established name. The owners of the original patents sought an injunction against the use of the name.

In litigation, which went to the United States Supreme Court, it was decided that anyone had the right to apply the name to machines made under the patents it described. To hold otherwise would be to extend the term of a patent monopoly. If a man had the right to manufacture these models, but had no right to advertise the fact or to give his machines the name by which they were known, then the effect would be practically the same as extending the patent. But while anyone might

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